92-740

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

C.F. BEAN CORPORATION,

Petitioner,

v.

MID-VALLEY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a benefit-of-insurance clause in a maritime contract which indirectly transfers liability through insurance from a negligent party to a non-negligent party is against public policy and unenforceable because it is in contravention of a series of United States Supreme Court decisions which prohibit such a result.

2. An underwriter of a marine insurance policy can not avoid the maritime law prohibition against subrogation from its own named insured by delaying the actual payment of the settlement, which it guaranteed to a third party, until after it proceeded, in the name of a different insured, against its named insured for indemnification.

PARTIES

The petitioner is C.F. Bean Corporation, the stock of which is privately held.

The respondent is Mid-Valley, Inc., a wholly owned subsidiary of Brown & Root, Inc. Brown & Root, Inc. is a subsidiary of Halliburton Co., a publicly traded corporation.

Highlands Insurance Co., Mid-Valley's underwriter, is also a wholly owned subsidiary of Halliburton Co., and is the real respondent in interest.

Paul Dombrowski, an individual, was the plaintiff in the action but is not a party to this petition.

Ocean Marine Indemnity Company, a wholly owned subsidiary of Gulf Coast Marine, Inc., was a party in the district court, but does not join in this petition. The stock of Gulf Coast Marine, Inc. is privately held.

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THE OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Third Circuit dated July 28, 1992 appears in the Appendix at A-1. The Final Order and Judgment of the District Court for the District of New Jersey appears in the Appendix at A-3. The Findings of Fact and Conclusions of Law of the District Court appears in the Appendix at A-5.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, affirming the district court, was rendered on July 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

28 USC § 1254
46 USC § 1303

The text of the above statutes appears in the Appendix at A-25.

STATEMENT OF THE CASE

C.F. Bean Corporation ("Bean") was the owner of the dredge BUBBA J (hereafter the "Dredge"), which it bareboat chartered to Mid-Valley, Inc. ("Mid-Valley") pursuant to a Master Bareboat Charter dated November 6, 1987 (the "Charter Party"). Under the terms of the Charter Party, Mid-Valley became the owner *pro hac vice* of the vessel. Bean had no involvement in the operation or management of the Dredge while it was under the Charter Party.

Pursuant to the Charter Party, Mid-Valley was to procure an insurance policy which provided "insurance coverage for the crew of the vessel." Mid-Valley was to name Bean as an additional insured on such policy and obtain a waiver of subrogation from the underwriters. To satisfy this obligation, Mid-Valley obtained Workers Compensation and Employers Liability Insurance Policy No. RWC-51-35-17, issued by Highlands Insurance Co., which named Bean as an additional insured with a waiver of subrogation.

Pursuant to the Charter Party, Bean was to procure an insurance policy which provided protection and indemnity insurance arising out of any accident or occurrence "excluding coverage of [the] crew of the vessel". Bean was to name Mid-Valley as an additional insured on such policy and obtain a waiver of subrogation from

the underwriters. To satisfy this obligation, Bean obtained a Protection and Indemnity (P&I) Insurance Policy No. 13369 issued by Gulf Coast Marine, Inc. as agents for the underwriter, Ocean Marine Indemnity Company. The policy named Brown & Root, Inc., Mid-Valley's parent corporation, and all of its subsidiaries as an additional insured with a waiver of subrogation.

Thus, Mid-Valley provided insurance, underwritten by Highlands Insurance Co., for "the crew of the vessel" and Bean provided insurance, underwritten by Gulf Coast Marine, Inc. through Ocean Marine Indemnity Company, for persons other than the crew. Each named the other as an additional assured and obtained a waiver of subrogation by the underwriter.

The Dredge was used by Mid-Valley to assist in the construction of a sewer pipeline across Newark Bay, New Jersey. Specifically, the Dredge was used to dig a trench across the bay, into which another Mid-Valley vessel, a pipeline laying barge would lay a pipeline, after which the Dredge would cover the pipeline with a protective layer of crushed rock. At each stage of the dredging/pipelaying job it was to be inspected by an inspection diver.

Plaintiff Paul Dombrowski was one of the inspection divers. He was employed by Boswell Underwater Engineering Company ("Boswell"). He was not on the payroll of Mid-Valley, nor under the direction or control of Mid-Valley in the performance of his work. In the course of his work, Mr. Dombrowski would dive off either the Dredge, the pipeline laying barge owned by Mid-Valley, or a dive boat owned by Boswell. When not actually in the water, he spent his time either on the Dredge eating his meals or otherwise relaxing, or in an office trailer located on Mid-Valley's pipelaying barge.

On September 14, 1988, Mr. Dombrowski was aboard the Dredge. As there was no diving to be done that day, he had come aboard to eat his lunch and watch television. After his lunch, he went out onto the deck of the Dredge to assist Mid-Valley's crew in changing a

pendant wire on a three ton anchor. As a result of Mid-Valley's negligence, the anchor, which was standing tripod fashion, fell on Mr. Dombrowski, causing his severe injuries.

Mr. Dombrowski sued Bean and Mid-Valley in the United States District Court for the District of New Jersey for damages as a result of his injuries. Bean and Mid-Valley cross-claimed against each other and demanded indemnity under the terms of the Charter Party, which each refused. Although both Bean and Mid-Valley demanded defense and indemnity from the other, the real issue was which insurance policy was to cover the loss under the terms of the Charter Party. That is, if Mr. Dombrowski was deemed to be a member of the crew then the policy procured by Mid-Valley covered the loss, but if he was not, the policy procured by Bean would provide coverage.[1]

In order to present the issue in the proper context, Ocean Marine Indemnity Company, the underwriter of the insurance policy procured by Bean, filed a declaratory judgment action in the United States District Court for the District of New Jersey against Mid-Valley, seeking a declaration that such policy did not cover the loss. By Order dated April 1, 1991 and docketed April 2, 1991, the two actions were consolidated. A-21. Throughout the case, Highlands Insurance Company, the underwriter of the policy procured by Mid-Valley, never denied coverage of the claim by Dombrowski.

While this case was pending in the United States District Court for the District of New Jersey, Mid-Valley commenced a separate civil action against Bean in the United States District Court for the Southern District of Texas. In that action, Mid-Valley sought to raise the identical issues which were before the District Court in

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1. In the courts below, Bean contended that Dombrowski was a crewman of the Dredge. The issue is not appealed to this Court. The issues raised herein were also argued to the trial and appellate court.

New Jersey. Ultimately, the Southern District of Texas dismissed the action based on the pendency of the New Jersey case. A-23, 24. There was no appeal of that dismissal.

The Pretrial Order which framed the issues for trial was entered on February 14, 1990. At that time there was no mention therein that Highlands Insurance Co. was attempting to breach its legal duty to Bean by indirectly seeking subrogation against it, since Highlands had not yet settled with the plaintiff and, therefore, the issue had not yet arisen.

The case was called for trial before United States Magistrate Judge Stanley R. Chesler on February 20, 1991. On that date, Mid-Valley and its underwriter Highlands entered into a settlement with Mr. Dombrowski in the amount of $900,000.00. Mid-Valley and Highlands represented through counsel that the settlement amount would not be paid until after the resolution of the indemnification issue but that workers' compensation in the amount of $616.96/week would be paid until the settlement was funded. Highlands Insurance Co., the underwriter of the insurance policy which Mid-Valley procured, guaranteed the terms of the settlement on the record and was the party which actually made the workers' compensation payments until it funded the settlement. Bean did not join in the settlement and objected to it as too high. The trial court instructed plaintiff to commence trial against Bean, the remaining defendant. Since Bean was not negligent in any way, Mr. Dombrowski agreed to a dismissal of his complaint as to Bean.

Upon the occurrence of the settlement between Highlands and the plaintiff on February 20, 1991, the subrogation issue entered the case for the first time. Upon the resumption of the trial, held April 1-2, 1991 before Magistrate Judge Chesler, on the Mid-Valley cross-claim for indemnification, Bean contended that where Highlands guaranteed the settlement to plaintiff and commenced paying workers' compensation until it

funded the settlement, it was Highlands not Mid-Valley that was now the real party in interest. By delaying the actual payment of the settlement until after the trial on the indemnification issue, Highlands was essentially seeking to indirectly subrogate against Bean, its named assured, in violation of its legal duty.

At the April 1-2, 1991 trial, Bean further contended that if the insurance policy which it procured pursuant to the cross- insurance clause of the Charter Party was deemed to cover the loss, then Mid-Valley effectively transferred all liability for its negligence to Bean, a non-negligent party, in violation of the rule established by This Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and its progeny.

On August 20, 1991, the court's Findings of Facts and Conclusions of Law were entered on the court's docket. A-5. The court held that Bean was obligated to indemnify Mid-Valley for the settlement amount, plus interest and attorney's fees. The court incorrectly concluded that the cross-insurance clause was not in violation of the *Bisso* Rule where it transferred the liability of Mid-Valley's negligence to Bean, a non-negligent party. The court further erred when it held that an underwriter must actually fund the settlement before an insured is permitted to assert that the underwriter is seeking to subrogate against it in violation of the legal and contractual prohibition against such conduct.

In a Stipulation dated November 4, 1991, entered on the docket on November 6, 1991, Bean and Mid-Valley agreed that $70,000 represented a fair and reasonable attorney's fee in the indemnity context. A Final Order and Judgment, dated November 4, 1991 was entered on the docket of the court on November 6, 1991. A-3.

An appeal of the District Court's Final Order and Judgment was taken to the United States Court of Appeals for the Third Circuit, which, on July 28, 1992, affirmed the judgment of the district court in a *per curiam* Judgment Order. A-1.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. A benefit-of-insurance clause in a maritime contract which indirectly, through insurance, transfers liability from a negligent party to a non-negligent party is against public policy and unenforceable because it is in contravention of a series of United States Supreme Court decisions which prohibit such a result.

In a series of maritime cases dating back to 1870, This Court has stated and restated the principle that a negligent party may not transfer, by contract, its liability to a non-negligent party. *The Steamer SYRACUSE,* 79 U.S. 167 (1870); *Compania de Navegacion v. Fireman's Fund Ins. Co. (THE WASH GRAY),* 277 U.S. 66 (1928); *Bisso v. Inland Waterways Corp.,* 349 U.S. 85 (1955); *Boston Metals Co. v. The WINDING GULF,* 349 U.S. 122 (1955); *Cresent Towing & Salvage Co. v. Dixilyn Drilling Corp.,* 372 U.S. 697 (1963). Collectively, these decisions have become known as the "*Bisso* Rule."

Despite invitations to exclude from the *Bisso* Rule those exculpatory clauses that were freely entered into at arms length, This Court has refused to change its opinion that exculpatory clauses entered into, under any circumstance, are *per se* unenforceable. *Bisso,* 211 F.2d 401, 403 (5th Cir. 1954), *reversed,* 349 U.S. 85, 100 (1955); *WINDING GULF,* 209 F.2d 410, 414 (4th Cir. 1954), *reversed,* 349 U.S. 122, 123 (1955); *Dixilyn Drilling,* 303 F.2d 239, 240-47 (5th Cir. 1962), *reversed,* 372 U.S. 697 (1963)(Justice Harlan concurring- certainty in the law governing commercial transactions would not be promoted by opening the *Bisso* Rule to "indeterminate exceptions.")

In *Bisso* as well as in *Dixilyn,* This Court invalidated the exculpatory clauses at issue even though it was aware that the cases actually involved parties bargaining at arms length over which should bear the expense of liability insurance. *Bisso,* 349 U.S. at 119; *Dixilyn,* 303 F.2d at 240-41, 244-45.

Further, since This Court has held that a party cannot do indirectly that which it cannot do directly, a contract clause which indirectly releases a party from its own negligence is likewise in violation of the *Bisso* Rule. *WINDING GULF,* 349 U.S. at 123; *Bisso,* 349 U.S. at 94.

Despite This Court's clearly stated doctrine invalidating repeated efforts to avoid liability for negligence, and the holding that a party cannot do indirectly that which it cannot do directly, over the last decade a series of appellate court decisions have carved out an exception to the Bisso Rule by validating contract clauses known as cross-insurance clauses. *See, Voisin v. O.D.E.C.O. Drilling Co.,* 744 F.2d 1174 (5th Cir. 1984), *cert. denied, Rig Hammers, Inc. v. Odeco Drilling Co.,* 470 U.S. 1053 (1985); *Fluour Western, Inc. v. G & H Offshore Towing Co.,* 447 F.2d 35 (5th Cir. 1971), *cert. denied,* 405 U.S. 922 (1972); *Twenty Grand Offshore Inc. v. West India Carriers,* 492 F.2d 679 (5th Cir. 1974), *cert. denied,* 419 U.S. 836 (1974); *Dillingham Tug & Barge Co. v. Collier Carbon and Chemical Corp.,* 707 F.2d 1086 (9th Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984). Such insurance clauses require a non-negligent party to provide insurance, name the negligent party as an additional assured, and waive subrogation against the negligent party. These insurance clauses operate to shift liability from the negligent party to the non-negligent party and, as such, are nothing more than an indirect attempt at exculpation.

In *Twenty Grand,* the district court refused to enforce a benefit-of-insurance clause recognizing that it was nothing more than an indirect attempt at exculpation in violation of the *Bisso* Rule. *Twenty Grand,* 328 F.Supp. 1385 (S.D. Fla. 1971). In *Crawford v. West India Carriers, Inc.,* 337 F.Supp. 262, 270-1 (S.D.Fla. 1971), the same district court, in refusing to enforce a benefit-of-insurance clause, stated that it did not want to be "the first to overrule the Supreme Court's opinion in *Bisso.*" The Fifth Circuit, however, apparently did not

feel compelled to follow the Supreme Court's deep-rooted principle and effectively disregarded the *Bisso* Rule by validating benefit-of-insurance clauses. *Twenty Grand, supra.* Even though in both *Bisso* and *Dixilyn,* This Court was aware that the cases really involved parties bargaining at arms length over which should bear the expense of liability insurance, the Fifth Circuit in upholding benefit-of-insurance clauses reasoned that the Supreme Court never contemplated that the *Bisso* Rule would apply in instances where the parties negotiate over which shall bear that expense. *Twenty Grand,* 492 F.2d at 683.

In *PPG Industries v. Ashland Oil Co.,* 592 F.2d 138 (3rd Cir. 1978), *cert. denied,* 444 U.S. 830 (1979), in dicta, the Third Circuit recognized that benefit-of-insurance clauses are nothing more than an indirect attempt at exculpation in violation of the *Bisso* Rule. *Id.* at 145. In the present case, the Third Circuit was directly confronted with a benefit-of-insurance clause which shifted the liability from the negligent party to the non-negligent party. Yet, the circuit court affirmed the district court's decision upholding the clause, despite its previously stated opinion that the cross-insurance clause was in violation of the *Bisso* Rule.

The Seventh Circuit now stands alone in its declaration that the impact of the *Bisso* Rule cannot be circumvented. *Dow Chemical Co. v. M/V Charles F. Detmar, Jr.,* 545 F.2d 1091, 1094 (7th Cir. 1976)(notwithstanding the "utilization of rather obviously circumlocutionary verbiage" in an attempt to circumvent the impact of *Bisso* Rule, such impact cannot be avoided.)

Congress has recognized that benefit-of-insurance clauses are an indirect way of shielding a party from its own negligence. *See,* Carriage of Goods by Sea Act

(COGSA), 46 U.S.C. Sec. 1303(8)[2] (A-25). Likewise, commentators have recognized that benefit-of-insurance clauses operate to do indirectly that which cannot be done directly. *See,* Dixon and Canning, *The Continuing Erosion of Bisso-Waiver of Subrogation and Benefit of Insurance Clauses,* 44 INS. Counsel J. 97 (1977) (through "judicial deviousness" a series of appellate opinions have circumnavigated a group of Supreme Court opinions known as the Bisso Rule.)

The rationale of the Bisso Rule is straightforward. This Court has repeatedly held that maritime contract clauses that attempt to place the liability for one party's negligence on the shoulders of another party are void as against public policy. The current benefit-of-insurance concept which places the burden of insuring against one party's negligence on another party is nothing more than an exculpatory clause in disguise and is in direct contravention of the *Bisso* Rule.

In the present case, the Charter Party provided that Bean, the owner of the vessel, would procure P&I insurance covering persons other than the crew of the vessel. Mid-Valley, the desponent owner, or owner *pro hac vice* under the Charter Party, would be named as an additional insured with a waiver of subrogation. Mid-Valley would provide insurance for the crew of the vessel, naming Bean as an additional insured with a waiver of subrogation. Both parties complied with the insurance requirements.

Mid-Valley was in complete possession and control of the Dredge, as owner *pro hac vice.* Mid-Valley's crew was changing a pendant wire on a three ton anchor set on the deck of the Dredge, and as a result of its

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2. "Any clause . . . relieving the carrier or the ship from liability . . . shall be null and void . . . *A benefit of insurance in favor of the carrier . . . shall be deemed to be a clause relieving the carrier from liability.*"

negligence the anchor fell on the plaintiff, Paul Dombrowski, causing his injuries. On the day of trial, Highlands Insurance Co., which had been defending Mid-Valley, settled the case with the plaintiff, guaranteeing such settlement in its own name. The plaintiff took a voluntary non-suit against Bean because it was not negligent in any way, having nothing to do with the operation of the Dredge.

The district court upheld the validity of the cross-insurance clause in the Charter Party, and the Third Circuit affirmed the district court's ruling, despite the fact that by doing so, the entire liability for Mid-Valley's negligence was transferred to Bean, a non-negligent party in contravention of the *Bisso* Rule.[3]

This case presents the quintessential vehicle for addressing the issue of whether benefit-of-insurance clauses in maritime contracts run afoul of the *Bisso* Rule. The parties to the contract have freely negotiated over which shall bear the cost of insurance. A third party was injured because of Mid-Valley's negligence, and if the benefit-of-insurance clause is enforceable, the entire liability for such negligence will be transferred to Bean,

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3. Ordinarily, when the liability of a negligent party is transferred to a non-negligent party through a benefit-of-insurance clause, the impact to the non-negligent party occurs over the long term since it will be subjected to increased insurance premiums and the loss recapture component of marine insurance premiums is substantial. The party whose negligence caused the accident will not be impacted at all, since it will not be required to pay the future increased premiums that accompany a major loss.

In the present case, however, not only is there a long term impact on the non-negligent party but there is also an immediate impact. One of the layers of Bean's excess insurance is insolvent and, therefore, the liability which would have fallen on that underwriter, absent insolvency, will now fall directly on Bean if it has to bear the liability for Mid-Valley's neglilgence. Thus, Bean will not only be forced to pay the future increased premium that accompanies a major loss, but will bear the brunt of direct liability for a major portion of the judgment due to the insolvency of the underwriter.

a non-negligent party. If such a result is permitted, the impact to Bean will be immediate and direct.

Emanating from the Fifth Circuit's opinion in *Twenty Grand* in 1974, for the last decade the Fifth and Ninth Circuits have circumvented the *Bisso* Rule by validating benefit-of-insurance clauses in maritime contracts. The Third Circuit, in *PPG Industries, supra,* recognized that benefit-of-insurance clauses violate the *Bisso* Rule. However, squarely faced with the issue in this case, the Third Circuit upheld the enforceability of such clause. The Seventh Circuit, however, continues to recognize that the impact of the *Bisso* Rule cannot be circumvented. Maritime law should be uniform. This Court should now lay to rest the uncertainty which has developed over the last decade concerning the enforceability of benefit-of-insurance clauses. Commercial interests, and their counsel, must know whether such clauses are, or are not, valid. If they are not, they should not be used. If they are valid, then parties to such contracts should not expend resources litigating the issue. Whether or not This Court ultimately determines that benefit-of-insurance clauses are valid and enforceable, the interpretation of such clauses must finally be resolved.

This Court should grant the Petition for Certiorari and hold that cross-insurance clauses which operate to indirectly transfer liability from the negligent party to the non-negligent party violate the *Bisso* Rule and, as such, are invalid and unenforceable.

2. An underwriter of a marine insurance policy can not avoid the maritime law prohibition against subrogation from its own named insured by delaying the actual payment of the settlement, which it guaranteed to a third party, until after it proceeded in the name of a different insured against its named insured for indemnification.

When a marine insurer pays a loss under an insurance policy, it becomes, by operation of law, subrogated to all the rights of the insured with regard to that loss. *Dillingham Tug,* 707 F.2d at 1090 (the right to sue a party responsible for a loss passes to an insurer once the insurer has paid for the loss); *Lundell v. Massey-Ferguson Services N.V.,* 277 F.Supp. 940, 944 (N.D. Iowa 1967), *citing, Liverpool & G.W. Steam Co. v. Phenix Ins. Co.,* 129 U.S. 397, 462 (1889).

However, by invoking the doctrine of subrogation, an underwriter has the rights of the assured against third parties, not a right to override its own obligation to those covered by the policy. *Great Lakes Transit Co. v. Interstate S.S. Co.,* 301 U.S. 646 (1937); *Atlas Assurance Co. Ltd. v. Harper,* 508 F.2d 1381 (9th Cir. 1975). An underwriter is simply not entitled to subrogate against its own insured. *Marathon Oil Co. v. Mid-Continent Underwriters,* 786 F.2d 1301 (5th Cir. 1986); *Great American Ins. Co. of New York v. Gulf Marine Drilling No. 1,* 302 F.2d 332 (5th Cir. 1962); *Insurance Co. of North American v. Elgin, Joliet & Eastern Railway Co.,* 229 F.2d 705 (7th Cir. 1956); *Builders & Manufacturer's Mut. Cas. Co. v. Preferred Automobile Ins. Co.,* 118 F.2d 118 (6th Cir. 1941); and, *Willamette-Western Corp. v. Columbia Pacific Towing Co.,* 466 F.2d 1390 (9th Cir. 1972).

Where the insurance policy contains a waiver of subrogation clause, the underwriter is prevented from recouping from the additional assured any portion of the sums it has paid to settle the claim, even on the theory that the recoupment is based on the additional assured's exposure for risks not covered by the policy. In other words, where the underwriter settles a claim on behalf of one insured under a policy, it can not seek subrogation from another named insured, even if the claim was not covered under the policy. *Marathon,* 786 F.2d at 1302-04; *Lanasse v. Travelers Ins. Co.,* 450 F.2d 580, 585 (5th

Cir. 1971), *cert. denied, Chevron Oil Co. v. Royal Ins. Co.,* 406 U.S. 921 (1970); *Dillingham Tug,* 707 F.2d at 1090-91.

Thus, when the insurer pays a settlement and the insurance policy contains a waiver of subrogation clause, the insurer is prohibited from recovering against an additional assured, either in its own name or in the more appealing name of a different assured, under any theory for any of the settlement amount. *Lanasse,* 450 F.2d at 585; *Dillingham* Tug, 707 F.2d at 1090.

In the present matter, on the day of trial – February 20, 1991, Highlands Insurance Company settled the case on behalf of Mid-Valley and, on the record, guaranteed such settlement in its own name. If Highlands had actually paid the settlement amount prior to the trial on the indemnification issue, there would be no question that Highlands, not Mid-Valley, was the real party in interest since it became, by operation of the law, subrogated to all the rights of Mid-Valley with regard to that loss. Because Highlands' policy named Bean as an assured with a waiver of subrogation, Highlands would be prohibited from pursuing an indemnification action against Bean under any theory for any of the settlement amount whether it was acting in its own name or in the more appealing name of Mid-Valley.

Highlands should not be permitted to avoid the prohibition against subrogation from its own named assured by delaying payment of the settlement amount until after the trial on the indemnification issue. Highlands was the real party in interest at the April 1, 1991 trial on the indemnity issue, whether or not it had actually paid the settlement, where it had guaranteed the payment and was the party actually making the workers' compensation payments to the plaintiff until such time as the settlement was funded. From the moment Highlands guaranteed the settlement, the subrogation issue entered the case and Bean had standing to prevent Highlands from seeking subrogation against

it. To hold otherwise, permits an underwriter to indirectly subrogate against its subrogation-immune assured, a result forbidden under maritime law.

The district court, however, held that Bean could not enforce its right to prevent Highlands from seeking subrogation until after Highlands actually paid the settlement amount, and that since Highlands had not actually paid the settlement prior to the April 1-2 trial, the "issue of subrogation [was] simply not in this case at all." Findings of Fact/Conclusions of Law, A-19, ftnt. 8. The Third Circuit affirmed this result.

Accordingly, under the present state of the law in the Third Circuit, an underwriter is permitted to circumvent the long established maritime law that it may not subrogate against its own named insured, where it settles a claim and guarantees such settlement but delays actually paying the claim, through a guarantee or otherwise, until after it has brought suit against its named assured (in the name of a different assured). This tactic is in violation of the underwriter's legal duty to the additional assured and renders the entire concept of waiver of subrogation meaningless. Indeed, this result renders the very concept of insurance meaningless, when the underwriter may sue its insured to recover its payment for the very loss it was paid a premium to insure.

The Third Circuit's affirmance of the district court's holding not only violates the well-settled maritime law but also places it squarely in conflict with the Fifth Circuit's decision in *Marathon,* and the Ninth Circuit's decisions in *Willamette-Western,* and *Dillingham Tug.* In these cases, the tactics that the underwriters employed to artfully dodge the waiver of subrogation against their additional assureds were not permitted. The Fifth and Ninth Circuits recognized that where the underwriter has, in effect, taken over a claim, the subrogation issue has entered the case no matter how

their intent was disguised, and any such attempt to indirectly recover indemnification from an additional assured is prohibited.

In *Marathon Oil Co. v. Mid-Continent Underwriters,* 786 F.2d 1301 (5th Cir. 1986), the underwriter devised a scheme whereby it settled a personal injury claim with an agreement that it would be entitled to recover half the settlement back if the injured person recovered from the subrogation-immune insured. *Id.* at 1303-4. The Fifth Circuit held that the effect of this "artful dodge" was an indirect attempt by the underwriter to subrogate against its named assured by using the third party as its "cat's paw." *Id.* at 1302, 1304. This tactic of seeking subrogation indirectly was in violation of the underwriter's legal duty to its named assured. *See also, Lanasse,* 450 F.2d at 585 (where, in effect, the settlement was made by the underwriter, any attempt either directly or indirectly to recover indemnification from an additional assured is prohibited.)

In *Willamette-Western Corp. v. Columbia Pacific Towing Co.,* 466 F.2d 1390 (9th Cir. 1972), the Ninth Circuit held that where the owner of a barge had executed loan receipts in favor of its underwriters, the underwriter would not be permitted to seek subrogation from their additional assureds under the guise of the loan receipts. *Id.* at 1393. Thus, the Ninth Circuit thwarted the underwriters' indirect attempt to seek subrogation from the additional assureds.

The Ninth Circuit in *Willamette-Western,* held that parties named as additional assureds on an insurance policy gained enforceable rights under the insurance contract at the time of its making. *Id.* at 1392. Accordingly, this case must be taken to mean that the additional assured has the right to enforce the waiver of subrogation, that is, to be free from the underwriter's attempt at subrogation, at any time after the insurance contract is executed, where it appears that the underwriter is, in effect, seeking to indirectly subrogate against the additional assured.

In *Dillingham Tug,* the Ninth Circuit held that the right to indemnification does not remain with the insured where an underwriter has settled a claim, and to the extent the underwriter seeks to subrogate against its own additional assured, it is prohibited from doing so. *Dillingham Tug,* 707 F.2d at 1090-91.

The Third Circuit is now in conflict with the Fifth and Ninth Circuits, and with the established law of This Court, in allowing the underwriter to pursue its subrogation claim against its insured, Bean, by employing a indirect tactic to accomplish this result. If the court's holding, that a named assured does not have standing to contest its underwriter's efforts to seek subrogation until the settlement amount which the underwriter *has guaranteed* is actually paid to the third party, then by delaying payment until after the indemnification issue has been tried, an underwriter can indirectly seek subrogation against its own insured.

An additional assured should have standing to challenge an underwriters' attempt at subrogation from the moment it appears that the underwriter is attempting to seek subrogation, no matter how such attempt is disguised. The Fifth and Ninth Circuits have so held. If an assured only had standing to challenge the underwriters' indirect attempt at subrogation from the time a settlement entered into by the underwriter has actually been funded, then by delaying such payment the underwriter can avoid the prohibition against subrogation and recover indemnification from its own insured. In the present case, this is the result as it now stands, and the waiver of subrogation is effectively unenforceable.

This Court should grant the Petition for Certiorari and prohibit an underwriter from indirectly subrogating from its own named assured through the new "artful dodge" of the guarantee.

CONCLUSION

Left unreviewed, the Third Circuit's decision affirming the district court stands for the following:

1. That a benefit-of-insurance clause in a maritime contract, which transfers liability from a negligent party to a non-negligent party indirectly through insurance, is valid and enforceable despite the decisions of the United States Supreme Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boston Metals Co. v. The WINDING GULF*, 349 U.S. 122 (1955); *Cresent Towing & Salvage Co. v. Dixilyn Drilling Corp.*, 372 U.S. 697 (1963), which prohibit such a result.

2. An underwriter of a marine insurance policy can avoid the maritime law prohibition against subrogation from its own named insured by delaying the actual payment of the settlement, which it guaranteed to a third party, until after it proceeded in the name of a different insured against its named insured for indemnification.

The writ of certiorari should issue, and this Court should review the decision of the courts below on these two important issues of maritime law.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 91-5981

PAUL DOMBROWSKI

v.

MID-VALLEY, INC., BEAN DREDGING CORP., C.F. BEAN CORP., TAYLOR DIVING, INC.

OCEAN MARINE INDEMNITY COMPANY

v.

MID-VALLEY, INC.
C.F. Bean Corporation,
Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 88-5243 & 90-2220
(Honorable Stanley R. Chesler)

Submitted July 13, 1992

BEFORE: SCIRICA, ROTH and HIGGINBOTHAM,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: July 28, 1992

WHITE AND WILLIAMS
By: Austin Hogan, Esquire
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One Liberty Place
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PAUL DOMBROWSKI	:	C.A. NO. 88-5243 (SCR)
v.	:	
MID-VALLEY, INC. and	:	
C.F. BEAN CORP.	:	

ORDER AND JUDGMENT

This action having been commenced by the filing of a Complaint and the service thereafter of a Summons and the Complaint on the defendants, and the defendants thereafter having served Answers to the Complaint; and thereafter on February 20, 1991, plaintiff having settled his claim with defendant MID-VALLEY, INC. for $900,000.00, and plaintiff having discontinued his claim against defendant, C.F. BEAN CORP.; and there having been held a non-jury trial before this Court on April 1-2, 1991, on MID-VALLEY's crossclaim against C.F. BEAN CORP.; and this Court having issued in its Findings of Fact and Conclusions of Law, same being entered on the docket on August 20, 1991, finding the $900,000.00 settlement fair and reasonable and further finding MID-VALLEY entitled to recover, in contract, on its crossclaim against C.F. BEAN CORP. for the full amount of the $900,000.00 settlement and MID-VALLEY's attorney's fees incurred in defending the action; and Mid-Valley having on September 25, 1991 concluded payment of a total of $900,000.00 to the plaintiff in satisfaction of the terms of the settlement;

and there being no just reason for delay of entry of this judgment, it is

ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of MID-VALLEY, INC. and against C.F. BEAN, INC. for the liquidated amount of $900,000.00 and attorney's fees in the amount of $70,000.00, together with post-judgment interest from the date hereof, at the rate of interest specified in 28 U.S.C. Section 1961.

November 4, 1991

/s/ Stanley R. Chesler
Stanley R. Chesler
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL DOMBROWSKI Plaintiff	: Hon. Maryanne T. Barry : U.S. District Judge
v.	: Civil Action No. 88-5243
MID-VALLEY, INC. and C.F. BEAN CORPORATION Defendant	: and 90-2220 : FINDINGS OF FACT AND : CONCLUSIONS OF LAW

STANLEY R. CHESLER, U.S. Magistrate Judge

INTRODUCTION

This matter was initially scheduled for trial on February 20, 1991.[4] However, on that date plaintiff settled with defendant Mid-Valley, Inc. for $900,000 – payment to be made following resolution of Mid-Valley's cross-claims against the non-settling co-defendant C.F. Bean. On the record, Bean objected to the settlement and its amount. Plaintiff voluntarily dismissed all of his claims against Bean, thus leaving only Mid-Valley's cross claim against Bean for trial. A non-jury trial of these claims was held on April 1-2, 1991 before the undersigned, with leave granted to the parties to supplement the record with depositions from two expert witnesses for Bean. Additionally, a declaratory judgment action by Bean's insurance carrier, *Ocean Marine Indemnity Co. v. Mid-Valley, Inc.* was consolidated for trial with the cross claims.

BACKGROUND

This action arises from injuries suffered by Paul Dombrowski while on a dredge, the Bubba J. Bean II, owned by Bean and "bareboat" chartered to Mid-Valley. Dombrowski, a diver employed by Boswell Underwater

4. The parties consented to trial before the undersigned pursuant to 28 U.S.C. § 636(C).

Engineering Company was on the vessel in connection with his duties as an inspector diver for Boswell. He was seriously injured when an anchor, resting on its "flukes" toppled over on him. Now presented for resolution by the Court are the following issues:

1. Does the charter agreement between Mid-Valley and Bean require Bean to procure protection and indemnity insurance for itself and Mid-Valley covering liability for accidental injuries suffered by any individual except a member of the crew?

2. If so, was Dombrowski a crew member within the meaning of the charter agreement.

3. If the insurance provisions of the charter agreement are interpreted in favor of Mid-Valley, are they void as against public policy?

4. Is the settlement with plaintiff Dombrowski unreasonable?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Interpretation of the Charter Agreement

As a result of substantial negotiations between representatives of Bean and Mid-Valley, the parties entered into a bareboat charter agreement on November 6, 1987 for the dredge vessel Bubba J. Bean II. According to the testimony of Mid-Valley's representative Scott Lyons, the only trial witness who participated in the negotiations, the extent of insurance coverage was one of the subjects which was specifically factored into the calculation of the charter rate ultimately agreed upon. This is corroborated by the fact that the insurance clauses bear a handwritten change made by the parties which altered the pre-typed form, and shifted the obligation from Mid-Valley to Bean, for obtaining the protection and indemnity insurance that is at issue. Lyons testified that it was agreed that Mid-Valley would provide worker's compensation and employer liability insurance covering its employees on the vessel, while Bean would obtain "P

& I" insurance (protection and indemnity insurance) which would cover liability to third parties if someone was insured as a result of the barge's work. The insurance clauses in the agreement as executed, read as follows:

> *OWNER shall procure and maintain* in full force and effect, at its sole cost and expense, unless otherwise stipulated in the "Charter Order" conditions, *the following insurance:*
> *(a) Hull and Machinery Insurance* on American Institute Hull Clauses (June 2, 1977) or equivalent, with limits equal to the agreed value of the VESSEL; and
> *(b) Protection and Indemnity Insurance* on SP-23 Form or equivalent, with minimum limits equal to the agreed value of the VESSEL *arising out of any one accident or occurrence , excluding coverage of crew* of the VESSEL.
> OWNER agrees that all of the *above insurance shall be endorsed to name CHARTERER as an additional assured* as respects CHARTERER's operation of the VESSEL hereunder, and to waive subrogation (whether direct, indirect, equitable, by loan receipt, or otherwise) against CHARTERER. Owner shall furnish CHARTERER with certificates and which certificate shall provide that thirty (30) days prior written notice of cancellation or material modification of the policy shall be given to CHARTERER. All deductibles shall be for the account of CHARTERER under this Charter.
> *CHARTERER agrees that they will provide insurance coverage for the crew of the vessel, and that the OWNER shall be added as an additional ASSURED.* The CHARTERER shall furnish OWNER with certificates, evidencing that coverage, which shall provide thirty days notice of cancellation, and the Underwriters waive subrogation against OWNER. (Emphasis added).

Mid-Valley contends that this language embodies Lyons understanding of the agreement – i.e., that Mid-Valley was to obtain insurance covering injuries to crew members, for the benefit of both itself and Bean, while Bean was to obtain coverage protecting both itself and Mid-Valley for liabilities to third parties which might arise from the barge's operation. Thus, in Mid-Valley's view, it was required to obtain only worker's compensation and employer's liability insurance under the agreement.

Bean, however, contends that the provisions should be interpreted so that the language obligating Charterer (Mid-Valley) to "provide insurance coverage for the crew of the Vessel" required Mid-Valley to procure insurance covering liability caused by the crew's conduct. Bean similarly argues that the provision requiring it to obtain Protection and Indemnity Insurance, "excluding coverage of the crew" – means that it was not required to obtain P & I insurance covering damage caused by the crew's negligence or misconduct.

This Court finds as a matter of fact that Bean's interpretation is incorrect and that the agreement should be construed as Mid-Valley asserts. Initially, the Court notes that Mid-Valley's interpretation is the more natural one. If the parties had desired to have the exclusionary clauses deal with the crew's *conduct*, as opposed to covering injuries to crew members, it appears reasonable that explicit language would have been utilized. Moreover, Mid-Valley's interpretation is consistent with the testimony of the only witness who participated in the negotiations, Scott Lyons. It is also consistent with the position taken by Bean prior to litigation. Thus, in correspondence from counsel for C.F. Bean dated April 21, 1989, (when Bean believed Dombrowski was a crew member) Mr. Cattell indicated "It is C.F. Bean's interpretation of the charter party that Mid-Valley was to provide protection and indemnity insurance coverage for all claims brought by crewmen aboard the vessel. . .The

insurance coverage to be provided by C.F. Bean Corporation was, and is, for claims brought by those who are not engaged in the mission of the Bubba J. Bean II. . ." The letter further indicates that "This was the intention of the parties at the time they entered into the charter party and remains the appropriate interpretation of the charter party". (Exhibit MV-5)

It should also be noted that C.F. Bean and its insurance broker actually reviewed the worker's compensation and employees' liability policies obtained by Mid-Valley – which did not include a P & I policy – and concluded that Mid-Valley had obtained the correct policies. (Exhibit MV-2)

The only evidence offered to support Bean's interpretation of the policy was that of Bean's employee James Moss, who was not a party to the negotiations. The Court concludes that his testimony, relating information be received from his boss concerning the insurance Bean and Mid-Valley were to obtain, is inadmissible hearsay under *Fed.R.Evidence* 801 (c). Moreover, even if it were not inadmissible, its probative value would be insignificant in view of the substantial weight of countervailing evidence.[5] The Court thus concludes that C.F. Bean was obligated under the charter agreement to provide P & I insurance covering injuries to non-crew members.

B. Was Dombrowski a Member of the Crew

The trial evidence establishes that, at the time of the accident, Dombrowski was employed as an inspection diver for Boswell Engineering. He was paid by Boswell and reported directly to a supervisor for that company.

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5. In view of the minimal probative value of this evidence, even if admissable, the court concludes that an extensive analysis of the hearsay issues is unwarranted. Suffice it is to say that the court concludes that Moss offered the assertions of the out of court declarant to prove the trusth of the matter asserted. *Fed.R. Evidence 801.*

There is no evidence that Mid-Valley hired, supervised, or controlled Dombrowski's activities in any way. He was simply engaged by Boswell to inspect pipeline work done by Mid-Valley in Newark bay.

Mid-Valley's work involved laying pipe in a trench dredged by it in the bottom of the bay. After the pipe was laid, the trench would be covered with crushed rock. Dombrowski was involved in inspecting the crushed backfill. He would sometimes dive from a small dive boat (provided by Boswell) which was tied to the Bubba J Bean II. A dive station was maintained by Boswell on a pipeline barge (also a Mid-Valley vessel) which was used in the pipe-laying project. The dive station was a small trailer office kept by Boswell on the barge. According to Dombrowski, days would go by when he would not go on Bubba J Bean II at all. He would stay in the trailer and read. When diving, he would dive from the barge or the skiff. According to Dombrowski:

> "Nine times out of ten – actually, months went by when I didn't dive off the Bean [Bubb a J. Bean II]. I was strictly on the pipe lay barge. The only reason I would go to the Bean [Bubba J. Bean II] would be to use their kitchen, their microwave, to sit at the T.V. I would sit there to break up what could be a monotonous job." (Tr. 4/1/91, p. 85).

He had no duties on the vessel.

According to Dombrowski on the day of the accident, "[A]t this point, there was no work for me to do that day. I was on the Bean simply because it was more comfortable". (Tr. 4/1/91, P. 85)

Despite the above evidence, Bean contends that Dombrowski was a member of the "crew" as that term was used in the charter agreement. Bean's argument is based upon various Fifth Circuit Court of Appeals cases which have held divers to be "seamen" under the Jones Act. See *e.g. Taylor v. Packer Diving & Salvage Co.*, 342 F.Supp. 365 (E.D. Pa. 1971), aff'd. 457 F.2d 512 (5th Cir. 1972), *Wallace v. Oceaneering Intern*, 727 F.2d 427

(5th Cir. 1984), *Pickle v. International Oilfield Divers. Inc.*, 791 F.2d 1237 (5th Cir. 1986), *cert. denied* 479 U.S. 1059 (1987). Bean contends that since both parties to the charter agreement are based in the Fifth Circuit, it must be assumed that they knew the courts would regard a diver as a "seaman". Bean further contends that the word "seaman" and "crewman" are used interchangeably by "all courts which have considered Jones Act cases" (C.F. Bean post trial brief, p. 28). Thus, Bean contends that the parties must have understood the word "crew" as used in the charter party to include any divers involved in the project – regardless of who was their employer.[6]

The problem with this argument is that there is not the slightest evidence that the parties intended to use the term "crew" in such a manner that it included individuals not employed by Mid-Valley. In short, as counsel for Mid-Valley has conceded, the term "crew" could very well possibly include divers based on the vessel. The real question is whether the parties intended it to include individuals not employed by the charterer, i.e. not hired, fired, supervised, or controlled by Mid-Valley. The meaning of the term, as understood by the parties, is perhaps made most clear by the cross-examination of Mid-Valley's witness, Mr. Lyons, on his understanding of the type of Charter the parties had negotiated. He testified as follows:

Q. Now, this is a Bareboat Charter. Correct?

A. Yes.

Q. What is a Bareboat Charter?

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6. Bean also relies on *McDermott International Inc. v. Wilander*, 1991 A.M.C. 913, 59 L.W. 4091 (1991) in which the Supreme Court adopted the 5th Circuit's test for status as a Jones Act "seaman". Since this case was decided long after the charter agreement was made, it is clearly of no relevance in interpreting the agreement.

A. It's the alternative to fully found. It means that we're taking the vessel essentially in a bare state.

Q. You're (Mid-Valley] going to take possession of the vessel. You're going to put your crew on it. You're going to be completely responsible for all aspects of its operation. That's the essence of a Bareboat Charter, right?

A. Correct.

Q. As compared to what you referred to as a fully found or what we might call a time charter, which is where Bean would provide a vessel fully found – that means completely equipped with all personnel and equipment aboard. They'll operate it and do whatever job you want them to do. Correct?

A. Correct.

Q. So in a fully found charter, Bean is going to employ the crew. They're going to be responsible for the crew's negligence. They're going to have the power to hire the crew, fire the crew, direct the crew, supervise the crew, discipline the crew in a fully found charter. Correct?

A. Correct.

Q. And in a Bareboat Charter, you (Mid-Valley) *are going to hire the crew, have the power to fire the crew. You're going to supervise the crew, control the crew. discipline the crew: correct?*

A. Correct.

(Tr. 4/1/91/; p. 34-35) (emphasis added)

From the foregoing, the only testimony on the issue adduced by either side, it is clear that the parties intended the word crew to include only those individuals who were employed by the charterer and under its control and supervision. There is simply no evidence

supporting Bean's contention that the term was equated by the parties with the term "seaman" under the Jones Act.

Indeed, while Bean vehemently argues that Dombrowski was a member of the crew of the Bubba J. Bean II, despite Mid-Valley's lack of any control or supervision over him, Bean nevertheless submitted the following proposed finding of fact concerning the meaning of the word "crew" under charter. The proposed finding reads:

> *Under the charter,* Mid-Valley would hire the *crew,* have the power to fire the *crew,* discipline the *crew,* instruct and train the *crew,* and supervise and control the *crew".* (Bean's post trial memo and proposed finding of facts, p. 8, ¶ 16). (emphasis added).

The Court concludes that this proposed finding of fact is indeed correct and that, since Mid-Valley had none of these powers over Dombrowski, he was not part of the "crew" as that term was understood by the parties

C. Was the Insurance Clause Void as a Matter of Public Policy

In *Bisso v. Inland Waterways Corp.,* 349 U.S. 85 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing Co.,* 372 U.S. 697 (1963) the Supreme Court indicated that an exculpatory clause in a maritime contract exempting a towboat operator from responsibility for his own negligence was void as against public policy.

The policy behind the *Bisso* rule is "(1) to discourage negligence by making wrongdoers pay damages and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains". *Bisso, supra,* 349 U.S. at 91.

Based upon an analysis of these policy factors, a number of courts have concluded that *Bisso* and *Dixilyn* are inapplicable in a situation where there is simply a contractual provision requiring the one party to procure

liability insurance which covers both parties to the contract. *Dillingham Tug v. Colier Carbon and Chemical Corp.,* 707 F.2d 1086 (9th Cir. 1983), *Twenty Grand Offshore Inc. v. West India Carriers,* 492 F.2d 679 (5th Cir. 1974). *Fluor Western Inc. v. G.H. Offshore Towing Co.,* 447 F.2d 35 (5th Cir. 1971). These courts simply concluded that the policy concerns protected by *Bisso* were not implicated where, as a result of fair arms-length negotiations, two parties of equal bargaining power decide between themselves which party would bear the cost of providing insurance. This analysis similarly has been applied, in the absence of over-reaching or oppressive conduct, to uphold contractual provisions requiring stevedores, *Voisin v. O.D.E.C.O. Drilling Inc.,* 744 F.2d 1174 (5th Cir. 1984) and charterers, *Slade Inc. v. Samson Towing Company,* 327 F.Supp. 555 (E.D. Tex. 1970) to purchase liability insurance with the ship owner as an added insured.

Bean however relies upon *P.P.G. Industries v. Ashland Oil Co.,* 592 F.2d 138 (3rd Cir. 1978) for the proposition that the Third Circuit holds all such cross insurance provisions to be void under *Bisso.* This court concludes, however, that *P.P.G.* does not control under the facts of this case.

Initially, it should be noted that the language in *P.P.G.* disapproving of cross insurance agreements is dicta. The court ultimately did not have to determine the validity of the agreement because it ultimately held that the insurance clause did not extend to the party claiming benefits under it — since that party was not covered by the shipping contract. *Id.* at 145.

Moreover, while the P.P.G. court indicated it was "unpersuaded" by *Twenty Grand Offshore Inc., supra* and *Fluor Western Inc.,* and "inclined to view *Dixilyn Drilling, supra* as proscribing indirect as well as direct exculpation of negligence by carriers" *P.P.G.* at 145, the court ultimately concluded that the Fifth Circuit's test was not met "because it never bargained with *P.P.G.* about cargo insurance, and therefore, cannot show a

reduction of its charges on that basis. Compare *Twenty Grand Offshore. Inc., supra* at 681-83." *Id.* at 145. Thus, by concluding that the Fifth Circuit test was not satisfied, the court was not called upon to definitively determine whether or not to accept that court's approach. *See Dillingham Tug v. Collier Carbon & Chemical Corp.,* 707 F.2d 1086, 1989, FN 2 (9th Cir. 1983) ("The only other circuit which has considered the question found an insurance provision to be unenforceable, saying it had not been bargained for, without giving further explanation. *P.P.G. Industries v. Ashland Oil Co.,* 592 F.2d 138 (3rd Cir. 1978), *cert. denied* 444 U.S. 830").

This case therefore can be readily distinguished from *P.P.G.* In particular, there is clear evidence that the insurance provisions were specifically bargained over as an element of the charter fee, and the court so finds as a matter of fact. (See Tr. 4/1/91, pgs. 19-21, 24-25). Indeed, an examination of the charter agreement shows that the key contractual provision, assigning to the "owner" the responsibility to obtain "P & I" insurance, has a handwritten initialled change from the original language – which as initially drafted required "charterer" to purchase this insurance. Thus it is clear that the provision in question was the result of arms length bargaining, with the ultimate adjustments on the insurance provisions being factored into the charter fee.

Finally, I am not at all convinced that *Bisso* applies at all to the contract which is the subject of this dispute. *Bisso* and *Dixilyn* specifically held that exculpatory clauses in towage contracts were void. Neither decision purported to state a general rule that *all* exculpatory clauses in *all* maritime contracts are void as against public policy. Rather the *Bisso* court focused on the particular economics of the towage industry, and concluded that the "increased maritime traffic today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions", *349 U.S. at 91.* There is no indication that

such similar concerns about "monopolistic compulsions" in the dredge leasing industry warrant application of *Bisso* to that field of enterprise. Thus, in the absence of any over-reaching, with no evidence that the charter agreement was a contract of adhesion, this court is not persuaded that *Bisso* applies at all.

Assuming arguendo that *Bisso* does apply to charter agreements, I am satisfied that under the facts of this case, enforcement of the cross insurance agreement is not barred by *P.P.G.*, and the agreements must be enforced.

D. Reasonableness of the Settlement

As discussed previously, immediately prior to trial, Dombrowski settled with Mid-Valley for $900,00. Bean did not participate in the settlement and objected to its amount. It is stipulated that counsel for Bean would have recommended $750,000 as a fair settlement and would not have rejected $800,000.

In evaluating the reasonableness of the settlement, the Court must consider the seriousness of the injuries, the likelihood of a finding of liability, and the economic consequences of the injury.

The injuries Paul Dombrowski suffered were extremely serious. Following the accident on September 14, 1988, he was admitted to Jersey City Medical Center where he remained until September 21, 1988. While there, he underwent surgery for a fracture of the left femur. The surgery was an open reduction and internal fixation of the left femur.

On September 24, 1988, he was admitted to Meadowlands Hospital Medical Center. According to the hospital record, plaintiff sustained multiple rib fractures, a fracture of the sternum, a fracture of the left clavicle, fracture of the transverse process L-1, L-2 and L-3, fracture dislocation L-4, L-5 with spondylolisthesis grade 1, a herniated disc at L-4, L-5, an internal derangement of the left knee, a possible left posterior

tibialis tendon tear, and a pulmonary embolism. Plaintiff was discharged from Meadowlands Hospital Medical Center on October 24, 1988. While in the hospital, he was fitted with a custom-made body jacket.

Plaintiff was at the Hospital for Joint Diseases Orthopedic Institute from February 5, 1989 to February 9, 1989. He underwent surgery for the injury sustained to his left ankle. The post-operative diagnosis was traumatic tenosynovitis and tendinitis tibialis posterior and flexor digitorum longus left. On June 13, 1989, plaintiff was admitted to Union Hospital where he underwent a diagnostic arthroscopy of the left knee. The post-operative diagnosis was incompetent anterior cruciate ligament left knee with grade II lateral collateral ligament laxity.

On December 20, 1989, plaintiff was admitted to Meadowlands Hospital Medical Center for removal of the screw in his left hip. He was readmitted on January 27, 1990, at which time the rod in his femur was removed.

As a result of the injuries to his back, plaintiff was confined to bed for six weeks following the accident. He was thereafter required to wear a full body jacket for approximately 10 months. He continues to wear the body jacket when he exercises, or if he is in an automobile in excess of one hour.

He still faces the possibility of surgery for removal of the herniated disc and/or spinal fusion, as well possible further surgery on his ankle and the possibility that the ankle will have to be fused.

Plaintiff has been receiving physical therapy treatment at Twin Boro Physical Therapy Associates 2 — 3 days a week to develop his left knee. He may be required to undergo total knee reconstruction.

Prior to the accident he was in fine physical condition and participated in running, triatholon, tennis water skiing, snow skiing and basketball. He will be unable to engage in any of these sports in the future. Currently, plaintiff can bend forward to approximately ten inches

above the floor. He cannot arch his back, tilt or twist. He suffers pain in his left hip, left knee and left ankle – regardless of the position of his body. He will not be able to engage in an occupation requiring any physical labor. As a result of these injuries, he has been unemployed since the accident. He has been attending college with the likelihood that his economic prospects will improve substantially upon obtaining his degree.

Despite the seriousness of these injuries, Mr. Green, Bean's expert on the reasonableness of the settlement, nevertheless concluded that a reasonable settlement would have been in the $600 - 700,000 range. He based that opinion primarily upon his conclusion that a fair minded jury would have assessed plaintiff with 50% contributory negligence based upon defendant's contention that there was no way the accident could have happened unless plaintiff crawled under the anchor.

This Court is far from persuaded that a reasonable jury would have found any substantial likelihood that plaintiff had been crawling under the anchor at the time it collapsed on him. Mr. Dombrowski, of course denied it. No witness in fact saw the accident and no one is in a position to definitively indicate that the accident could only have happened that way. Indeed Bean's expert on the issue, Mr. Robert McArdle, while having extensive experience as a diver, had no particular expertise in accident reconstruction or with the mechanics of anchors – and how they collapse on people. This Court was simply unpersuaded that there was any particular likelihood that the accident happened as Mr. McCardle described.[7] The only other witness who indicates that plaintiff crawled under the anchor, also didn't see the accident occur. His opinion is, at best, lay opinion testimony – if admissible at trial at all.

---

7. There are simply too many possible scenarios which could reasonably explain why Mr. Dombrowski was found as he was – under the anchor, other than Mr. McCardle's conclusion that he was crawling under it.

Because of this, the Court is persuaded that Mr. Green substantially undervalued the settlement value of this case. The court therefore agrees with Mr. Deasey (Mid-Valley's expert on the reasonableness of the settlement) that, at most the jury would have found a 25% contributory negligence factor. In view of the seriousness of the injuries, their undoubted permanency, the substantial pain and suffering involved, and the extent of possible contributory negligence which might be found, the Court adopts Mr. Deasey's view and finds as fact that the $900,000 settlement was fair and reasonable.

CONCLUSION

Based upon the foregoing I conclude that Bean and Mid-Valley entered into an enforceable agreement for Bean to purchase, at its own cost, Protection and Indemnity Insurance for the benefit of both.[8] The policy which Bean agreed to purchase was a Protection and Indemnity Policy which would cover liability to third parties arising from operations of the vessel. In particular it covered injuries to a non-crew member (Dombrowski) caused by the conduct of the Bubba J. Bean II's crew.[9]

---

8. A last minute claim raised by Bean is that Mid-Valley's cross-claim is really a subrogation claim by Mid-Valley's insurance carrier. According to Bean, since it is also covered by Mid-Valley's insurance as an added insured, the carrier is barred under common law principles, from seeking subrogation from its insured under the policy. This contention is frivolous. Subrogation only occurs when an insurer has paid the claim of its insured. It then steps into the insured's shoes and pursues its rights. *Bank Tower Communications v. Home Ins. Co.,* 590 F.Supp. 1038 (E.D.Pa. 1984). Here the insurance company for Mid-Valley has paid nothing. Mid-Valley has simply sued on its contract to have Bean provide the insurance it contends Bean agreed to provide in the contract. The issue of subrogation is simply not in this case at all.

9. An additional last minute argument raised by Bean is that the accident was really caused by the negligence of Mid-Valley's shore based personnel who directed the anchor to be placed on the dredge despite the captains contrary preference. In Bean's view this

The court further concludes that the agreement is not void as against public policy. Moreover the evidence before the court satisfies it that Mid-Valley obtained the insurance policies it was obligated to provide under the agreement, and is therefore not in breach of the agreement. Mid-Valley is therefore entitled to recover, in contract, on its cross-claim against Bean for the amount of the settlement, ($900,000) any pre-judgment interest which may have accrued to Dombrowski under the settlement agreement and Mid-Valley attorney's fees incurred in defending the action.[10]

/s/ Stanley R. Chesler
Stanley R. Chesler
United States Magistrate Judge

NOTES *(Continued)*

means that the accident would be covered under Mid-Valley's comprehensive general liability policy. This argument is also frivolous. Regardless of who directed the anchor to be brought aboard, the shipboard personnel who directed that it be placed in an unstable position, and neglected to provide warnings about its instability, clearly bear responsibility for the accident. This liability would be covered by the P and I policy which Bean agreed to purchase.

10. If the parties cannot stipulate to the amount of fees and interest by September *19th*, 1991, an evidentiary hearing shall be held before me on that date to determine the issue.

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ATTORNEY FOR PLAINTIFF, OCEAN MARINE INDEMNITY COMPANY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OCEAN MARINE INDEMNITY COMPANY,	:	CIVIL ACTION
Plaintiff,	:	NO. 90-2220 (MTB)
vs.	:	
MID-VALLEY, INC.,	:	
Defendant.	:	STIPULATION AND ORDER

It is hereby stipulated between the parties hereto, and ordered by the court, by the Honorable Stanley R. Chesler, United States Magistrate, that this matter be reopened and restored to the active docket of the court to be assigned to the docket of United States Magistrate Stanley R. Chesler in accordance with the provisions of 28 U.S.C. § 636(c) as provided by the consent of the parties separately filed with the Clerk of the Court.

It is further stipulated between the parties and ordered by the court that this action be consolidated with Civil Action 88-5243(SRC) presently on the docket of Magistrate Chesler.

CLARK, LADNER, FORTENBAUGH & YOUNG
Attorney for Plaintiff

BY: /s/ Edward V. Cattell, Jr.
EDWARD V. CATTELL, JR.

DATED: February 22, 1991

MID-VALLEY, INC.
Attorney for Defendant

BY: /s/ Austin Hogan
AUSTIN HOGAN

DATED: 4/1/91
So Ordered:

/s/ Maryanne Trump Barry
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MID-VALLEY, INC.	§	
	§	
vs.	§	C.A. NO. H-90-465
	§	
C.F. BEAN CORPORATION	§	

ORDER WITHDRAWING PREVIOUS ORDER, AND ORDER OF DISMISSAL

THIS DAY came on for consideration the Defendant C.F. Bean Corporation's motion for reconsideration of this Court's order denying Bean's motion to dismiss; and came the parties by their respective attorneys of record, and the Court having reconsidered the motion and the other pleadings filed herein, the argument of counsel, and the applicable law, is of the opinion that this suit should be dismissed on the ground that another action between the same parties, involving the same or similar issues, is already pending in Cause No. 88-5243 in the United States District Court for the District of New Jersey styled Paul Dombrowski v. Mid- Valley, Inc. and C.F. Bean Corp.

Accordingly, it is ORDERED that this Court's order denying defendant's motion to dismiss, signed April 9, 1990, is hereby withdrawn, and it is further ORDERED that this suit be and the same is hereby dismissed, with all costs of court being taxed to the plaintiff.

SIGNED at Houston, Texas this 29 day of June, 1990.

/s/ Kenneth M. Hoyt

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF TEXAS
HOUSTON DIVISION

MID-VALLEY, INC.	§	
	§	
VS.	§	C.A. NO. H-90-465
	§	
C.F. BEAN CORPORATION	§	

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS DAY came on for consideration the Plaintiff Mid-Valley, Inc.'s motion for reconsideration of this Court's order signed June 29, 1990 granting defendant's motion to dismiss; and came the parties by their respective attorneys of record, and the Court having considered the motion, is of the opinion that the motion should be denied.

Accordingly, it is ORDERED that plaintiff's motion for reconsideration of the Court's Order signed June 29, 1990 is hereby denied.

SIGNED at Houston, Texas this 12 day of September, 1990.

/s/ Kenneth M. Hoyt

UNITED STATES DISTRICT JUDGE

28 U.S.C. § 1254

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, §2(a), (b), 102 Stat. 662.)

46 USC 1303

§ 1303. Responsibilities and liabilities of carrier and ship

(1) Seaworthiness. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) Cargo. The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) Contents of bill. After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Bill as prima facie evidence. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: Provided, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916, commonly known as the "Pomerene Bills of Lading Act".

(5) Guaranty of statements. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity

shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Notice of loss or damage; limitation of actions. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) "Shipped" bill of lading. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: Provided, That if the shipper shall have previously taken

up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) **Limitation of liability for negligence.** Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

(Apr. 16, 1936, ch 229, Title I, § 3, 49 Stat. 1208.)

(2)

No. 92-740

Supreme Court, U.S.
FILED
NOV 24 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

C.F. BEAN CORPORATION,

Petitioner,

vs.

MID-VALLEY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the trial court erred in holding that a master bareboat charter which contained cross-insurance clauses was enforceable.

2. Whether the trial court erred in holding that respondent was entitled to prevail on its cross claim based on petitioner's breach of contract.

PARTIES

1. The Petitioner is C.F. Bean Corporation, the stock of which is privately held.

2. The Respondent is Mid-Valley, Inc., a wholly owned subsidiary of Brown & Root, Inc. Brown & Root, Inc. is a subsidiary of Halliburton Co., a publicly traded corporation.

3. Paul Dombrowski, an individual, was the plaintiff in the original action but is not a party to this petition.

4. Ocean Marine Indemnity Company, a wholly owned subsidiary of Gulf Coast Marine, Inc., was a party in the District Court, but does not join in the Petition. The stock of Gulf Coast Marine, Inc. is privately held.

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II. The workers compensation and employers liability policy obtained by Mid-Valley in satisfaction of its obligations under the master bareboat charter, which named Bean as an additional insured, did not provide coverage for non-crew members such as the plaintiff, Paul Dombrowski. Accordingly,	

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the trial court properly characterized this action as one for breach of contract for which Mid-Valley was entitled to recover against Bean. 15

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No. 92-740

In the

Supreme Court of the United States

October Term, 1992

C.F. BEAN CORPORATION,

Petitioner,

vs.

MID-VALLEY, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On November 6, 1987 Petitioner (hereinafter "Bean") and Respondent (hereinafter "Mid-Valley") entered into a master bareboat charter for the dredge Bubba J. Bean II. The charter (hereinafter the "Charter") resulted from extensive arms-length bargaining between representatives of Bean and Mid-Valley. The charter hire rate was $800 per day payable to Bean. While MidValley felt that $800 per day was too high, they agreed to that rate in consideration for Bean's agreement to provide hull and

machinery as well as protection and indemnity insurance for injuries to non-crewmembers. In turn, Mid-Valley was to provide workers compensation and employers liability insurance for their crew.

In fulfilling its obligations under the Charter, Mid-Valley purchased workers compensation and employers liability insurance from Highlands Insurance Company. This policy covered injuries to crewmembers. Bean provided hull and machinery insurance as well as protection and indemnity insurance covering injuries to noncrewmembers under a policy issued by Ocean Marine Insurance Company. The trial court found, and there was no dispute on appeal, that Paul Dombrowski, the plaintiff in the underlying action, was not a member of Mid-Valley's crew. Accordingly, the protection and indemnity policy purchased by Bean covered the injuries suffered by Paul Dombrowski. Conversely, it is now undisputed that the Mid-Valley workers compensation and employers liability insurance policy did not apply to the injuries suffered by Paul Dombrowski.

Paul Dombrowski was injured on the Bubba J. Bean II when an anchor toppled over on him, crushing him to the deck. Dombrowski sued Bean and Mid-Valley. The defendants crossclaimed against each other because of the mutual obligations to obtain insurance under the Charter. Bean and its underwriters refused to provide coverage and a defense to Mid-Valley in breach of the Charter.

Because of Bean's breach of contract Mid-Valley was exposed to a potentially enormous verdict if the plaintiff, Paul Dombrowski's case went to trial. Mid-Valley further had the duty to mitigate the damages occasioned by Bean's breach of contract. Mid-Valley satisfied that legal obligation by entering into a fair and reasonable settlement with the plaintiff on February 20, 1991,

thereby capping the potential exposure.[1] Plaintiff ageed to a non-suit as to Bean.

At that point, the only remaining dispute concerned the rights and obligations under the Charter as between Bean and Mid-Valley. Those rights and obligations did not and could not cease by virtue of the responsible position taken by Mid-Valley in settling the claim of Dombrowski and thereby mitigating the damages caused by Bean's continued breach of their obligations under the charter party.

Trial on the crossclaims proceeded on April 1-2, 1991. Following the conclusion of the trial, the court held in favor of Mid-Valley and against Bean on Mid-Valley's crossclaim, for the amount of the settlement with the plaintiff including interest and attorney's fees. A final Order and Judgment, dated November 4, 1991 was entered on the docket of the court on November 6, 1991 in favor of Mid-Valley in the amount of $900,000 plus attorney's fees of $70,000, plus post-judgment interest thereon.

An appeal of the District Court's final Order and Judgment was taken to the United States Court of Appeals for the Third Circuit. Extensive briefing ensued in the Third Circuit which included Bean's brief, Mid-Valley's brief, as well as a reply brief filed by Bean. On July 28, 1992 the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court in

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1. Bean's repeated assertions that Highlands settled the case with Dombrowski are ludicrous. Dombrowski sued Mid-Valley. Dombrowski settled with Mid-Valley. That Highlands, a sister corporation of Mid-Valley, may have financed the settlement is completely irrelevant. All that matters in the dispute before this Court is the fact that the Highlands policy, obtained by Mid-Valley in satisfaction of their obligations under the charter party, and which named Bean as an additional insured, covered only injuries to crewmembers. Paul Dombrowski was not a crewmember.

a *per curiam* judgment order. The Petition for a Writ of Certiorari followed.

SUMMARY OF ARGUMENT

Mutual clauses in a master bareboat charter negotiated at arms length, in good faith and without coercion or any elements of monopolistic compulsion or overreaching, requiring that each party to the agreement take out insurance coverage for specifically enumerated risks, naming the other party as a named insured and waiving subrogation rights against the other party are valid and enforceable as between the parties. The circuit courts are now in unanimous agreement that requirements to procure insurance are not invalidated either by *Bisso*[2] or as otherwise contrary to public policy.

Petitioner has misstated the law, has mischaracterized this action as one for subrogation, and in the process has incorrectly argued that Highlands Insurance Company, which has never been a party to this case, is in fact the real party in interest. The policy issued by Highlands, which named Bean as an additional insured, did not provide coverage for non-crew members such as Dombrowski. Mid-Valley was never contractually responsible for obtaining coverage for injuries to non-crew members such as Dombrowski. Accordingly, the trial court properly characterized this matter as a breach of contract action between Bean and MidValley and correctly ruled in Mid-Valley's favor.

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2. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

REASONS FOR DENYING THE WRIT

I.

Mutual clauses in a master bareboat charter negotiated at arms length, in good faith and without coercion or any elements of monopolistic compulsions or overreaching, requiring that each party to the agreement take out insurance coverage for certain enumerated risks, naming the other party as an additional insured and waiving subrogation against the other party are valid and enforceable and do not contravene any decisions of this Court.

On November 6, 1987 Mid-Valley and Bean, two parties of equal bargaining power sat across a table and negotiated a master bareboat charter. By the terms of this agreement Mid-Valley was to have the use of a dredge barge owned by Bean, for a specified period of time. It was to be used in fulfilling a contract MidValley had to lay a pipeline across Newark Harbor. The pipeline was to be buried beneath the harbor floor.

Now, Bean suggests an expansive, yet unfounded reading of the "*Bisso*"[3] line of cases in order to have this Court find the charter void as against public policy. However, the *Bisso* line of cases simply has no application to the master bareboat charter before this Court.

All the appellate courts as well as the commentators who have interpreted the *Bisso* line of cases agree that *Bisso* now stands only for the proposition that in a *contract of towage*, a provision that directly and entirely exculpates the tug from any and all liability

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3. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Boston Metals Co. v. The WINDING GULF*, 349 U.S. 122 (1955); *Dixilyn Drilling Co. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

whatsoever will be held to be invalid, and then only in circumstances where there is clear evidence before the court of a markedly unequal bargaining position between the tug and the tow.[4] *See generally:* Dixon and Canning, *The Continuing Erosion of Bisso–Waiver of Subrogation and Benefit of Insurance Clauses,* 44 Ins. Counsel J. 97 (1977); *see also: Hercules, Inc. v. The Stevens Shipping Co., Inc.,* 698 F.2d 726 (5th Cir. 1983) ("It bears repeating that, if the contract is one for transportation, we have no difficulty finding *Bisso* inapplicable.l').[5]

The clause in the instant matter is not exculpatory nor did it insulate Mid-Valley from the effects of its negligence, either directly or indirectly. In theory and in fact Mid-Valley was responsible for its negligence. The mutual insuring clauses contained in the master bareboat charter designated as between the parties which insurer was to bear what loss *inter se,* and had no effect upon the liability of Mid-Valley for damages resulting from its negligence, either to third parties or to the dredge. The clause shifted liability for paying certain types of losses to a particular insurer but did not shift or purport to shift the ultimate responsibility for negligence.

Mid-Valley, in the first instance, remained liable to anyone injured on the vessel whether they were crew members or not. For

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4. In effect, all the parties in this case agreed to do was to allocate the costs of insurance, a practice recognized and endorsed by courts and commentators directly addressing the issue.

5. *See also:* Schoenbaum, T. *Admiralty and Maritime Law,* 1987 ("Two major exceptions exist to the admiralty rule allowing indemnity. First, contracts releasing towers from liability from negligent towing of a barge are against public policy. (Citing *Bisso*). This is a narrow exception, limited to towage contracts; the effect of the rule is largely obviated by provisions in towing contracts naming the tower as an additional insured; *id.* at page 152).

example, Mid-Valley remained responsible for losses exceeding the required insurance (the agreed value of the vessel). Finally, if for instance Bean went out of existence and it had never purchased insurance as it was required to do under the charter, Mid-Valley also remained liable in the first instance to anyone injured aboard the vessel as a result of its negligence.[6] Accordingly, the *Bisso* line of cases which invalidated agreements which completely exculpated a tug from its own negligence simply have no bearing on this case.

A review of the this Court's views on freedom of contract, the historical background of the "Bisso Rule", and subsequent appellate decisions which have correctly limited and distinguished *Bisso* lead to the inevitable conclusion that the trial court and the Third Circuit were correct in enforcing the contract between Mid-Valley and Bean. Bean now asks this Court to become the first appellate court to apply *Bisso* to invalidate a master bareboat charter containing cross insurance clauses entered into between parties of equal bargaining power. Such an invitation, which essentially flies in the face of the public policy upholding freedom of contract between commercial entities should be declined by this Court.

Consistent with general contract law, parties to a maritime transaction enjoy freedom of contract. Thus, in the absence of an

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6. Bean raises in footnote #3 of its Petition facts which were not before either the District Court or the Third Circuit Court of Appeals. Whether one of Bean's excess insurance carriers is insolvent or not is simply irrelevant to a determination of the issues before this Court. In taking its appeal to the Third Circuit Bean filed a supersedeas bond which will ensure payment of the judgment. Furthermore, the fact of the insolvency of the insurance carrier reinforces Mid-Valley's arguments that the cross insurance clauses were not exculpatory nor did they insulate Mid-Valley from the effects of its own negligence either directly or indirectly.

unconscionable disparity in bargaining positions, contracting parties in the maritime area are free to distribute liabilities and costs as they wish. *Fluor Western, Inc. v. G. & H. Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971).[7]

As early as 1937, This Court had the opportunity to construe the effect of a benefit of insurance and waiver of subrogation clause in a contract of common carriage. In *Great Lakes Transit Corp. v. Interstate S.S. Co.*, 301 U.S. 646 (1937) This Court denied an insurer the right to proceed by way of subrogation against a carrier which had procured cargo insurance for the benefit of itself and the cargo owner but had charged the cargo owner a carriage price which reflected the cost of the premium for such insurance. The insurer had argued that since the cargo owner was the ultimate procurer of the insurance, (having paid an increased rate equal to the cost of the insurance) the insurer could proceed under its subrogated rights against the negligent carrier as a third party. This Court disagreed and enforced the cargo insurance in favor of the carrier despite the fact that the cargo was damaged as a result of the carrier~s negligence and even though the underwriter had no subrogation rights. Similarly, in *Lukenbach v. W.J. McCahan Sugar Ref. Co.*, 248 U.S. 139 (1918) this Court refused to grant an

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7. *See also*, Schill, G., *Recent Developments Regarding Maritime Contribution and Indemnity*, 51 La. L. Rev. 975 (1991) ("With the exception of the maritime contractor who is protected by the Longshore Act and the tug/tow situations illustrated in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629 (1955) maritime principles permit the parties to enter into an agreement whereby the indemnitor holds the indemnitee harmless for the latter's negligence."); Rodriguez-Atketz, J. *Apportionment of Risk in Vessel and Marine Terminal Contracts*, 64 Tulane Review 497 (1989) (The prohibition against exculpation in towage agreements was the product of a desire to protect the community from overreaching and "monopolistic compulsions" (citations omitted). The prohibition is consistent with the freedoms permitted of parties to private contracts of affreightment, absent factors suggesting an unconscionable bargain resulting from a disparity in bargaining positions. *Id.* at page 502.)

insurer a recovery against a negligent carrier where the cargo insurance had been purchased by the shipper, named the carrier as an additional assured and waived subrogation rights against the carrier.

Bean's argument would effectively render the whole concept of an additional insured void as against public policy. Bean's argument taken to its logical conclusion is that any time two commercial entities agree to provide insurance for certain risks and add the other party to the contract as an additional insured, negligence on the part of the additional insured is being encouraged since damages are paid by the insurance. Every liability insurance policy insulates the insured and the additional insured from the cost of negligence, at least to the extent of the amount of the insurance. Bean's position would invalidate such policies. Courts attuned to commercial realities have not seen fit to take that step, recognizing that allocation of insurance costs is a normal part of doing business. *See e.g., Transport Indem. Co. v. Home Indemnity Co.*, 535 F.2d 232 (3d Cir. 1976) (lessor of trucks provided insurance for fire, theft, comprehensive and collision insurance; the lessee covenanted to provide insurance for injuries to third parties). In a nutshell, the issue of which party to a contract is to buy insurance for a particular risk is not the 'evil" sought to be remedied by the *Bisso* trilogy. In fact, a careful review of the *Bisso* holding demonstrates that *Bisso* has no application in the conflict before this Court involving a master bareboat charter.

The issue to which this Court addressed itself in *Bisso* was whether a tug may validly contract away all liability for its own negligent towage. This Court reviewed its earlier finding in *The Steamer Syracuse*, 12 Wall 167 (1871) which was decided "in an era of manifest judicial hostility toward release-from-negligence contracts, *particularly those made by businesses dealing widely with the public and having potential monopolistic powers." Bisso,* at 349 U.S. 89. (emphasis added). The *Bisso* Court cited situations

involving common carriers, and telegraph company contracts as other examples of situations calling for judicial intervention. A divided Supreme Court (5-3) held that a release from liability clause in a contract of towage was invalid as against public policy. The majority opinion emphasized two basic objectives for the application of this doctrine to the towage industry: first, to discourage negligence by making wrongdoers pay damages; and second, to protect those in need of goods or services from being overreached by towers who have the power to drive hard bargains. *Bisso* at 349 U.S. 90-91. While the majority opinion did not cite any statistical data in support of the determination that monopolistic conditions existed in the towage industry, the Court reasoned that because of increased maritime traffic it was not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions. *Bisso* at 349 U.S. 91.

The *Bisso* Court emphasized that the rule was merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships involving unequal bargaining power such as bailors and bailees, employers and employees, public service companies and their customers. The *Bisso* opinion when discussing the bailor/bailee relationship referred to cases collected in 175 A.L.R. 110-141. *Bisso* at 349 U.S. 91, footnote #14. In that article the commentator distinguished an ordinary bailee's right to make a contract exempting him from liability from those contracts of bailment for hire entered into by the bailee in a course of a general dealing with the public (so-called "professional bailees").

The Court in *Bisso* also referred to another section of the same A.L.R. article dealing with public service corporations. There, it was noted that in the case of contracts between public service corporations and their customers the difference in the relative bargaining power is so pronounced as to make any attempt on the

part of the corporations to exempt themselves from liability for their own negligence particularly obnoxious. One should therefore expect the courts unanimously to hold such clauses invalid as against public policy.

Contrary to Bean's assertion in its Petition that the *Bisso* Court was aware that the case really involved parties bargaining at arms length, such an argument clearly ignores the second public policy consideration enunciated by the Court that those in need of goods or services had to be protected from being overreached by those who had the power to drive a hard bargain. This is further reflected in this Court's reasoning in *Southwestern Sugar and Molasses Co. v. River Terminal Corp.*, 350 U.S. 411, 79 S. Ct. 1210 (1958) where it was held that the rule of *Bisso*, however applicable where the tow boat owner has the power to drive hard bargains, may well call for modification when the power is effectively controlled by a pervasive regulatory scheme. 360 U.S. at 418. Similarly, in the absence of monopolistic compulsions the forces of the market place effectively control the ability of parties to allocate costs as they deem appropriate, including the costs of insurance for particularly enumerated risks. Insurance is a fact of life in modern business, and insurance arrangements such as the one at issue herein are to be found in many types of commercial agreements.[8]

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8. *See Ogea v. Loffland Bros. Co.*, 622 F.2d 186 (5th Cir. 1980) (contract between drilling platform owner and operator which required the operator to procure insurance naming the owner as a co-insured with waiver of subrogation); *Aetna Casualty and Surety Co. v. L.K. Comstock & Co.*, 488 F. Supp. 732 (D. Nev. 1980) (agreement between owner and prime contractor for construction of oil storage tank, wherein contractor was obligated to procure insurance with owner as named insured); *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980) (contract between stevedoring contractor and steamship company providing that steamship company would be named a co-insured under stevedore's liability insurance policies).

The unstated premise which underlies Bean's arguments is that the *Bisso* rule forbidding exculpatory arrangements is one of general application in the maritime field, rather than in the very narrow area of towage contracts. As the foregoing has made clear, this is simply not the case. Thus, despite Bean's assertion to the contrary, the Third Circuit in affirming the ruling of the District Court here, did not depart from its application of the law in *PPG Industries v. Ashland Oil Company Thomas Petroleum*, 592 F.2d 138 (3rd Cir. 1978), *cert. denied*, 444 U.S. 830 (1979). In *PPG*, the opinion precisely characterizes the rule in *Bisso* and *Dixilyn Drilling* as "bar[ring] contract provisions that shift responsibility for tower's negligence." 592 F.2d at 145.

There would indeed have been a conflict between the Circuits if the Third Circuit in the instant matter had followed its *dicta*[9] in *PPG Industries, Inc. v. Ashland Oil Company Thomas Petroleum*, 592 F.2d 138 (3rd Cir. 1978), *cert. denied*, 444 U.S. 830 (1979). Instead, the Third Circuit decided to follow the holdings of every other Circuit which has considered the issue that cross insurance clauses are not invalidated either by *Bisso* or as contrary to public policy.[10]

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9. Mere *dictum* in a decision of one Court of Appeals which is in conflict with the decision of another Court of Appeals is an insufficient reason to grant a petition for certiorari. *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924).

10. Bean has also misstated the basis for the Court's holding in *Dixilyn v. Drilling Co. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963). Contrary to Bean's assertions, the Fifth Circuit never addressed the insurance issue as part of their reasoning. In fact it would have been of no import even if the Fifth Circuit had because the contract in *Dixilyn* required the barge owner to *completely* indemnify the tower against the tower's own negligence. Rather the Fifth Circuit addressed the first concern of *Bisso, supra* (to discourage negligence by making wrongdoers pay damages) and said it was inapplicable because of the peculiar hazards involved in towing the barge in question. This Court in reversing the Fifth Circuit never even addressed the issue of insurance and simply held that the Fifth Circuit was in conflict with *Bisso* and *Winding Gulf* with no further explanation.

Contrary to Bean's arguments, all circuits which have passed upon benefit of insurance clauses have held they are not invalidated either by *Bisso* or as contrary to public policy.[11] Indeed, Bean's argument that the Seventh Circuit now stands alone in its declaration that the impact of the *Bisso* rule cannot be circumvented, citing *Dow Chemical Co. v. M/V Charles F. Deitmayor, Jr.*, 545 F.2d 1091, 1094 (7th Cir. 1976) constitutes a misstatement of the holding in *Dow Chemical.*

In *Dow Chemical, supra,* Dow, as owner of a barge, contracted with a tugboat operator to move the barge. While under tow, the barge collided with a bridge. The towage contract contained intricate and involved language designed to exculpate the tower. The tower asserted that certain provisions of the contract constituted a specific undertaking on the part of the barge owner to indemnify and hold harmless the tower for any damage to the towed barge which might result from the tower's negligence. Another section of the contract discussed insurance, but the barge owner did not carry insurance and, the court noted, there was no duty imposed upon the barge owner to carry insurance for the benefit of the tugboat.

The court in *Dow Chemical* specifically distinguished the situation before the court in *Twenty Grand Offshore, Inc. v. West*

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11. *Hooks v. Southeast Construction Corp.*, 538 F.2d 431 (D.C. Cir. 1976); *Kerr-McGee Corporation v. Law*, 479 F.2d 61 (4th Cir. 1973); *Crawford v. West India Carrier, Inc.*, 337 F. Supp. 262 (S.D. Fla. 1971), *reversed*, 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); *Twenty-Grand Offshore v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), *cert. denied*,, 419 U.S. 836 (1974); *Voisin v. O.D.E. C.O. Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984); *Fluor Western, Inc. v. G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); *Basf Wyandotte Corp. v. Tug Leander*, 590 F.2d 96 (5th Cir. 1979); *Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61 (6th Cir. 1982); *Calcasieu Chemical Corp. v. Canal Barge Co.*, 404 F.2d 1227 (7th Cir. 1969); *Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086 (9th Cir. 1983), *cert denied*, 465 U.S. 1025 (1984).

India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836, 95 S. Ct. 63, 42 L. Ed.2d 62 which required each party to fully insure its vessel, to effect a waiver of subrogation and to name the other party as an additional insurer. Furthermore, the court specifically distinguished between a contract of towage involving complete exculpation and other situations involving third parties or of contracts of affreightment citing to its own opinion in *Calcasieu Chemical Corp. v. Canal Barge Co.*, 404 F.2d 1227 (7th Cir. 1969) which upheld insurance provisions similar to those before the court in *Twenty Grand, supra, Fluor Western, supra* and all of the other Circuits which have directly addressed the issue. The Seventh Circuit also noted that to hold the barge owner responsible would have been manifestly unfair since the barge owner might itself have insured against the loss, even though occasioned by its own negligence.

Bean argues that maritime law should be uniform. With this notion respondent wholeheartedly agrees. Every Circuit Court which has now considered the issue before This Court now agrees that cross insurance clauses are enforceable, absent overreaching, and do not violate any public policy. The *dicta* from *PPG* now having been erased, there is no longer any uncertainty over whether such clauses are valid and enforceable. In light of the unanimity of opinion among the circuits there is no important reason for this Court to grant Bean's Petition for Certiorari.

II.

The workers compensation and employers liability policy obtained by Mid-Valley in satisfaction of its obligations under the master bareboat charter which named Bean as an additional insured did not provide coverage for non-crew members such as the plaintiff, Paul Dombrowski. Accordingly, the trial court properly characterized this action as one for breach of contract for which Mid-Valley was entitled to recover against Bean.

Bean has seriously misstated the law in an effort to convert this matter from a breach of contract action to one involving subrogation.[12] The claim, boiled down to its essence, is that of Mid-Valley against Bean to enforce the charter obligations mutually agreed upon by the parties. The right to enforce the charter belongs and has always belonged solely to Mid-Valley. Bean's attempted recharacterization of the action cannot alter the respective rights and obligations accruing to Bean and Mid-Valley under the terms of the charter party. These cannot be nullified by virtue of the responsible position taken by Mid-Valley in settling the claim of Dombrowski and in the process mitigating the damages caused by Bean's continued breach of its obligations under the charter. Bean's latest position is tantamount to arguing that MidValley had no rights to enforce the mutual obligations contained in the charter party solely because of its settlement of the Dombrowski claim.

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12. Interestingly, the closest any party came to violating the "waiver of subrogation" clauses in the charter occurred when Ocean Marine sued Mid-Valley in the related action. (Civil Action No. 90-2220). Because Bean was to provide P&I Insurance for injuries such as those suffered by Dombrowski, Ocean Marine's policy should have come into play. If Ocean Marine had stepped in and paid Dombrowski's claim (Bean's breach of contract prevented this from occurring) then Ocean Marine never should have filed suit against its own additional assured, Mid-Valley, for this particular risk. *Dow Chemical Company v. M/V ROBERTA TABOR, and M/V SUGARLAND,* 815 F.2d 1037 (5th Cir. 1987).

Bean has cited *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301 (5th Cir. 1986) for the proposition that where an underwriter settles a claim on behalf of one insured under a policy, it cannot seek subrogation from another insured, even if the claim was not covered under the policy. Not only has Bean mischaracterized the holding in *Marathon, supra*, but it has completely failed to bring to this Court's attention the subsequent Fifth Circuit decision in *Dow Chemical Company v. M/V ROBERTA TABOR, and M/V SUGARLAND*, 815 F.2d 1037 (5th Cir. 1987) which discusses the *Marathon* opinion and which is directly on point with respect to the issues in this case.[13]

In *Marathon*, the insurance at issue did not protect Marathon, an additional insured under the policy,with respect to liability arising out the activity in which it was engaged — the operation of offshore platforms — but did insure against the type of risk that occurred (injury to the seaman). Accordingly, the court properly held that the insurance company could not subrogate against Marathon for a risk covered by the policy, the injury to the seaman. As discussed above, the policy which Mid-Valley obtained in full compliance with its obligations under the charter was an employer's liability policy which did not cover the risk which is the subject of the underlying lawsuit, namely, injury to non-crew members such as Paul Dombrowski. Accordingly, the facts as well as the holding in *Dow Chemical Company v. M\V ROBERTA TABOR and M/V SUGARLAND*, 815 F.2d 1037 (5th Cir. 1987) are dispositive.

In *Dow Chemical*, Chotin owned the barge, the M/V Sugarland which it fully chartered to Dow. The charter agreement between Dow and Chotin required Dow to obtain hull insurance

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13. In its brief to the Third Circuit Bean had argued that *Dow Chemical Company* was directly on point (although they misstated the holding in that case as well). Mid-Valley agreed with that assertion as did the Third Circuit.

and protection and indemnity insurance on the barge and to name Chotin as an additional insured with a waiver of subrogation. Dow chose to self-insure which was permitted under the charter. Neither the standard hull insurance nor the P&I insurance that Dow was obligated to obtain would have insured either party for loss of use of the barge. Because Dow had elected to self-insure, Dow was, in effect, Chotin's hull underwriter for any damage to the barges. As Chotin's hull underwriter, Dow also agreed to waive all rights of subrogation against Chotin. Consequently, the court properly held that Dow could not recover from Chotin damages *for a loss covered by the hull policy.*

The *Dow* court came to a different result however when it analyzed Dow's claim against Chotin for the loss of use of the barges:

> In the case sub judice, however, neither the standard hull insurance nor the P&I insurance that Dow was obligated to obtain would have insured Chotin against the loss of use claim asserted by Dow. Hence, Dow was not Chotin's hull underwriter with respect to that claim. Since Dow was not Chotin's underwriter with respect to this claim, Dow was not prevented by the charter party from suing Chotin for loss of use. Hence, we hold that the district court erred in holding that Dow' s suit against Chotin for loss of use constituted a breach of Dow's obligations under the charter parties.

Dow Chemical Company, supra at 815 F.2d 1045.

In the instant matter, injuries suffered by Paul Dombrowski, a non-crew member within the meaning of the master bareboat charter, were not claims or risks covered by the insurance that Mid-

Valley was contractually obligated to obtain. Thus, it is clear that neither Mid-Valley, nor Highlands for that matter, was Bean's underwriter with respect to the claim of Paul Dombrowski. Accordingly, Mid-Valley was not prevented by the charter party from suing Bean for its breach of contract. Simply put, this matter involved no more than a breach of Bean's responsibility to come forward with the insurance which they agreed to provide in the master bareboat charter.

CONCLUSION

The master bareboat charter entered into between Mid-Valley and Bean, two sophisticated commercial entities of equal bargaining powers must be enforced. The *Bisso* line of cases which have been explicitly limited to the towing industry have no application to the dispute before this Court. In fact, the public policy of freedom of contract as announced by this Court as well as appellate courts nationwide requires enforcement of the charter in question. The charter merely facilitated the allocation of the costs of insurance. Such agreements are routinely enforced in the commercial setting and there is no reason for disturbing this long-established commercial practice.

Furthermore, the instant matter does not involve any issues of subrogation. Mid-Valley was never contractually obligated to obtain insurance coverage for injuries suffered by Dombrowski. The dispute here is purely and simply one between Mid-Valley and Bean to enforce obligations fairly bargained for and clearly set forth in the charter. *Dow Chemical Company v. M/V ROBERTA TAYLOR and M/V SUGARLAND,* 815 F.2d 1037 (5th Cir. 1987) is controlling.

For all of the foregoing reasons it is repectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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